

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

76-2154

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
HOWARD LIPINSKI,

Petitioner-Appellant,

-against-

PEOPLE OF THE STATE OF NEW YORK,

Respondent-Appellee.

PETITION FOR REHEARING

Docket No. 76-2154

-----X
Petition For Rehearing with a suggestion for Rehearing
EN BANC

SIRS:

PLEASE TAKE NOTICE, that this petition in accord with Rule 40 of the Federal Rules of Appellate Procedure will be filed with the United States Court of Appeals for the Second Circuit's clerk's office United States Court House, Foley Square, New York, New York on the eleventh day of April, 1977 to move this Court to granting the following relief:

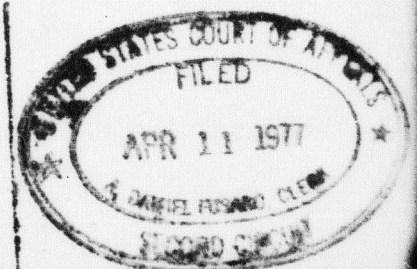
That the denial of a writ of habeas corpus which was affirmed by this Court on March 28, 1977 be put back on the calendar for a rehearing
Or that the Court grant the writ of habeas corpus without a rehearing
Or for any other relief that would be just and proper.

DATED: April 10, 1977

Howard Lipinski
HOWARD LIPINSKI
Petitioner-Appellant
525 Riverdale Avenue
Yonkers, N.Y. 10705
(914) 968-0370

Rec'd 4-11-77 - 9:40 AM

*2 copies
by: L. Q. Mayne
District Attorney's office - West. Co.*



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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HOWARD LIPINSKI,

Petitioner-Appellant,

-against-

AFFIDAVIT

PEOPLE OF THE STATE OF NEW YORK,

Respondent-Appellee.
-----X

STATE OF NEW YORK ss:
COUNTY OF WESTCHESTER

HOWARD LIPINSKI, being duly sworn, deposes and says:

1. That I am the Petitioner-Appellant in the above captioned matter.
2. That I have direct knowledge of all of the following:

On page eleven of its decision of March 28, 1977 the Court states:

"Even if Bendetson had testified in accordance with his taped conversation, Lipinski would have established only that Staryk alone had seen the umbrella in Lipinski's shopping bag. But the state was quite prepared to rely exclusively on Staryk's testimony. It is hardly unfair to discourage Lipinski from calling Bendetson for the sole purpose of showing that Bendetson could add nothing to what Staryk had said."

However, there were at least five other differing statements made by Bendetson in the tape which the Court did not even mention; one of which completely exonerates me of any crime whatsoever.

From the transcript (Xerox "A"):

BENDETSON: I saw he had a shopping bag. We followe~~d~~ him down. Inside the shopping bag nothing was sticking out. We followed him into the Sporting Goods Department. He went right to the tennis racquets. He took two tennis racquets off the wall and put them inside the shopping bag. I saw this and so did somebody else. He then went over to the cash register and produced a receipt for them. And that was that.

ARTHUR LIPINSKI: He took only two racquets from the wall, you say?

BENDETSON: He took two tennis racquets off the wall and put them into a shopping bag. There was another tennis racquet too; whether he wanted to buy it or exchange it or what I don't know. All I did was, see him take two tennis racquets off the wall and put them into the shopping bag and walk over to the cash register.

ARTHUR LIPINSKI: Where was the clerk at that time?

BENDETSON: He was there, by the cash register.

ARTHUR LIPINSKI: Well, how close is the cash register to the tennis racquets?

BENDETSON: It could be about ten feet. But there's a counter in front of it. The clerk could not see him.

ARTHUR LIPINSKI: Were You able to see what he had in the bag?

BENDETSON: No. But I know he didn't have two tennis racquets. It was impossible to have two tennis racquets in there.

ARTHUR LIPINSKI: How big a bag was it?

Bendetson: Regular size shopping bag.

I. Bendetson said on the above tape that he couldn't see into the shopping bag. Staryk testified that he saw directly down into the bottom of the bag and that there were no tennis racquets in it. That there was nothing in the bag except a black umbrella draped over the rear side of the bag. The Yonkers Police Department inventory of the shopping bag while I was being booked itemized several small packages in the shopping bag in addition to the black umbrella. If Staryk had seen into the bag he would have seen the small packages.

Both Staryk at trial and Bendetson on tape said that it was impossible in any case for the shopping bag to have held two tennis racquets without part of those racquets sticking out of the bag. At trial Staryk said the dimensions of the shopping bag in question were approximately 18 by 20 inches.

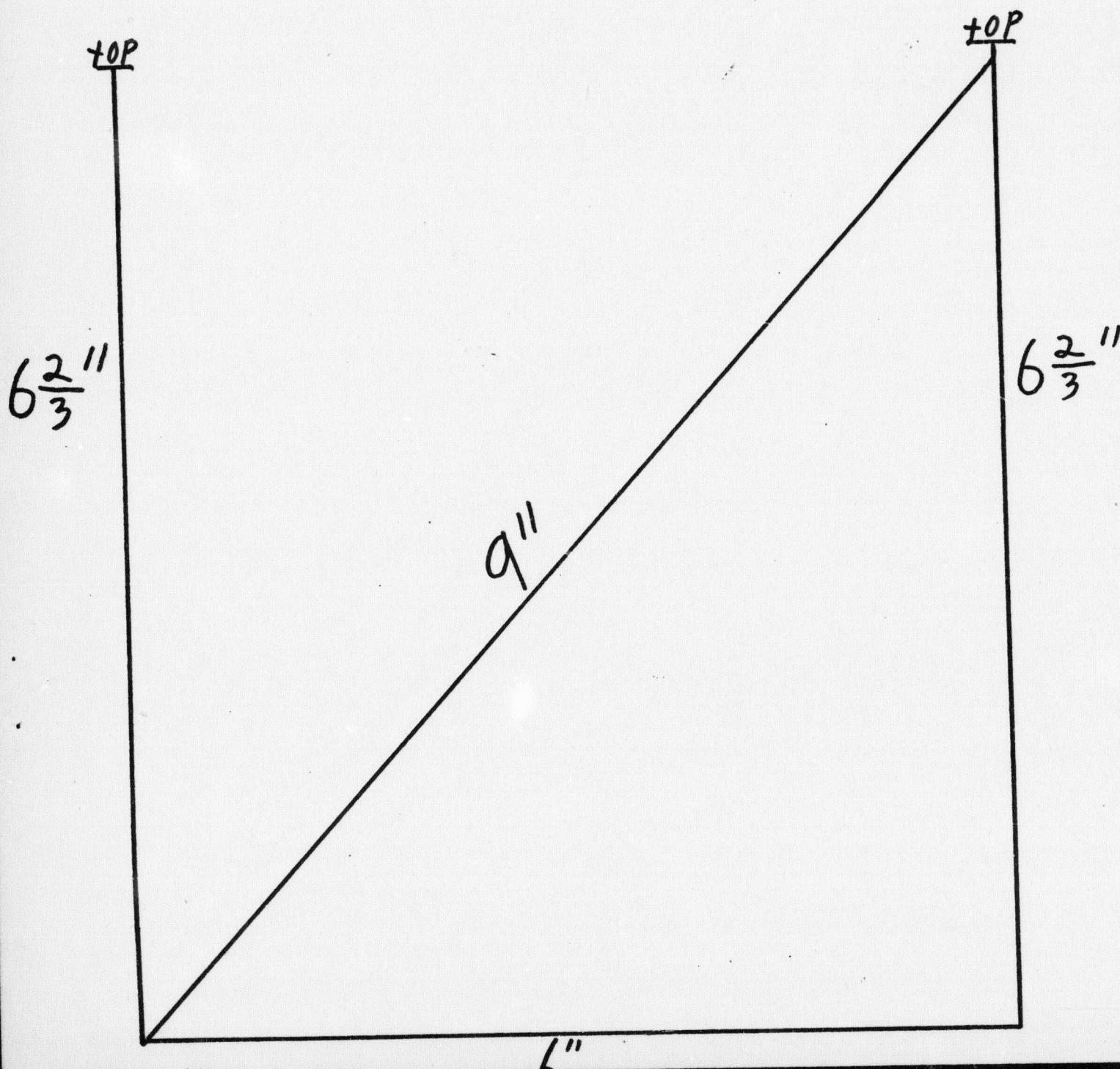
At trial I produced an 18 by 20 inch shopping bag which held the two racquets in question (each racquet being 27 inches in length) without

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any part of the racquets sticking out.

The following $\frac{1}{3}$ scale drawing shows the reason why:

I would also point out that an actual shopping bag made of paper is more flexible and hence "bigger" than the below drawing.



II. At trial Staryk testified that there were no other tennis racquets involved besides the two I allegedly tried to steal. Bendetson said on the tape: "There was another tennis racquet too; whether he wanted to buy it or exchange it or what, I don't know. All I did was, see him take two tennis racquets off the wall and put them into the shopping bag, and walk over to the cash register."

Also, according to Bendetson, the distance from the cash register to the tennis racquets is about ten feet.

Where did this other tennis racquet come from? The only possible answer is from my allegedly empty shopping bag. If this is so I am exonerated.

III. Staryk testified that no exchange of racquets took place.

Bendetson said on the tape: "There was another tennis racquet too; whether he wanted to buy it or exchange it or what I don't know."

"Defense" witness Domenica Chillemi, a Gimbels sales clerk, whose pre-trial taping I was also not allowed to use, testified that A. I had been in the same Gimbel's Sporting Goods Department several days before my arrest inquiring about a tennis racquet exchange, and that B. She told me to come back to the Sporting Goods Department (which I did the night of my arrest) when someone more knowledgeable would be there to effect an exchange.

The Sporting Goods clerk Pistecchia (People's Witness) testified that on the night of my arrest that he couldn't remember if there had been an exchange or not.

IV. Staryk testified that the clerk Pistecchia was not in the Sporting Goods Department until I brought the racquets to the cash register. Pistecchia also testified to that effect.

Bendetson said on the tape:

ARTHUR LIPINSKI: Where was the clerk at that time?

BENDETSON: He was there by the cash register.

V. Staryk testified that there was no counter between the cash register and the tennis racquets. Bendetson said on the tape that there was: "But there's a counter in front of it (the cash register). The clerk could not see him."

Photographs taken by my father, Arthur Lipinski, the day after the alleged crime and which were entered into evidence at trial show no counter between the racquets and the cash register.

VI. The black umbrella which Saryk claims was draped over the rear side of the shopping bag and was sticking out and which Bendetson said wasn't: I had Saryk demonstrate holding a shopping bag 18 by 20 inches with an umbrella draped over the rear side during cross-examination: he admitted that it was awkward and clumsy. Why would I walk into Gimbel's with a lop sided shopping bag?

In addition Bendetson said on the tape that he and Saryk had followed me because A. I had been in the store before (quite innocently according to the testimony of their own clerk Chillemi) and that B. I had been carrying a big shopping bag (what else would I use to carry back to Gimbel's tennis racquets for an exchange)?

Bendetson and Saryk also testified that they had a clear unobstructed view from the adjoining record department of my activities in sporting goods. Photographic evidence introduced at trial showed numerous above eye-level obstructions between records and sporting goods.

I strongly feel that the contrast between the recorded statements by Bendetson and the trial testimony of Saryk is so great and so exonerating of me that the Chambers v. Mississippi precedent should be invoked.

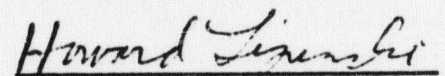
I am innocent of this crime and wish a new trial to prove my innocence.

WHEREFORE, I respectfully pray that this Court order this matter to be put back on the calendar for a rehearing, or to grant me a Writ of Habeas Corpus without a rehearing, or for any other relief which would be just and proper.

Wherefore, your deponent submits this instant affidavit.

Sworn to before me this 11
day of April, 1977,


LUCILLE DI PADOVA
Notary Public, State of New York
No. 60-6042185
Qualified in Westchester County
Commission Expires March 30, 1978


HOWARD LIPINSKI
Petitioner-Appellant
525 Riverdale Avenue
Yonkers, N.Y. 10705
(914) 968-0370

TAPE RECORDING MADE AT 87 NEPPERHAN AVENUE, YONKERS, N.Y., BETWEEN ARTHUR LIPINSKI AND ROBERT BENDETSON ON MARCH 16, 1974.

ROBERT BENDETSON: What seems to be the problem?

ARTHUR LIPINSKI: Well, you tell me, what is the problem?

R.B.: I saw your son enter the store with a shopping bag. Myself and another detective; and followed him down to the Sporting Goods department. Inside the shopping bag was a

A.L.: I'm familiar with Gimbels. Is that on the Main Floor?

R.B.: He came in through the Central Park Doors, the Men's Department. We followed him in. He's been in the store before. Well, that's beside the point.

I saw he had a shopping bag. We followed him down. Inside the shopping bag nothing was sticking out. We followed him into the Sporting Goods Department. He went right to the tennis racquets. He took two tennis racquets off the wall and put them inside the shopping bag. I saw this and so did somebody else. He then went over to the cash register and produced a receipt for them. And that was that.

A.L.: He only took two racquets from the wall, you say?

R.B.: HE Took two tennis racquets off the wall and put them into a shopping bag. There was another tennis racquet too; whether he wanted to buy it or exchange it or what, I don't know. All I did was, see him take two tennis racquets off the wall and put them into the shopping bag; and walk over to the cash register.

A.L.: Where was the clerk at that time?

R.B.: He was there, by the cash register.

A.L.: Well, how close is the cash register to the tennis racquets?

R.B.: It could be about ten feet. But there's a counter in front of it. The clerk could not see him.

A.L.: You say you saw him in the store before?

R.B.: That's right.

A.L.: Doing what?

R.B.: I just saw him.

A.L.: Well

R.B.: That had no bearing on it at all Mister. I do my job, okay?

A.L.: But I've been in this store before, for example, a thousand times. I don't know if every time I go into the store you follow me. Or if you follow everybody in.

R.B.: As far as that's concerned, I'll follow anyone I want or whoever I think is doing something.

A.L.: Well, that's the point I'm trying to find out. I've come into the store with shopping bags and other kinds of bags.

R.B.: I'll follow anybody that has a big bag.

A.L.: In other words, you followed him because he had a big bag?

R.B.: Sure.

A.L.: Were you able to see what he had in the bag?

R.B.: No. But I know he didn't have two tennis racquets. It was impossible to have two tennis racquets in there.

A.L.: How big a bag was it?

R.B.: Regular size shopping bag.

A.L.: Well, a regular size shopping bag is big enough

R.B.: O.K. I've said enough. I saw him take two tennis racquets and put them in the bag-so did my partner; that's all.

A.L.: Well, how far away were you from him.

R.B.: I can't tell you that. I can't tell you that.

A

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